IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1338 of 1980

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

YAKUB ALLAUDDIN

Versus

MOHAMMEDBBAI & CO.

Appearance:

1. First Appeal No. 1338 of 1980

MR MB GANDHI for appellant No. 1

NOTICE SERVED for Respondents No. 1-3

CORAM : MR.JUSTICE A.M.KAPADIA

Date of decision: 08/01/2002

ORAL JUDGEMENT

1. Challenge in this appeal filed under Section 96 of the Code of Civil Procedure, 1908 ('the Code' for short) is the judgment and preliminary decree dated September 26, 1979 passed in Civil Suit No. 382 of 1976

by the learned Judge, Court No.15 of City Civil Court, Ahmedabad by which the suit filed by appellant herein is allowed and consequently preliminary decree for dissolution of partnership firm and accounts is passed. Though the preliminary decree is passed in favour of the appellant the tenancy right in the suit property as well as profit on interest on the capital employed by the appellant is not granted in his favour. The appellant has, therefore, brought under challenge the said judgment and preliminary decree by filing this appeal.

2. A firm run in the name and style of M/s. Mohammedbhai & Co., engaged in the business of selling cycles and spare parts from 1962 was initially constituted between the appellant's brother Fakir Mohammed Allauddin and respondent Nos.2 and 3. Since the appellant's brother retired on December 31, 1973, the appellant was taken as a partner in the said partnership firm in the place of his brother by reconstituting the said partnership firm in which each partner had 1/3 share in the profit and loss. Every partner was entitled to withdraw Rs.300/- per month from the suit firm. Respondent Nos.2 and 3 were in possession of the books of accounts of the suit firm and the stock of the firm. Inspite of requests made by the appellant for settlement of the accounts respondent Nos.2 and 3 gave false promises and did not render accounts. According to the appellant, respondent Nos.2 and 3 were in possession of the stock worth Rs.1,50,000/- to Rs.2,00,000/- whereas they showed the stock worth Rs.80,000/- only. The appellant, therefore, filed the suit for declaration for dissolution of the partnership firm and rendition of the accounts.

3. The suit was contested by respondent Nos.2 and 3 by filing their written statement at Ex.15 wherein inter alia they denied all the allegations made in the plaint. It was stated that there was a new partnership between the appellant and respondent Nos.2 and 3. The appellant had not invested any amount and on account of good relations with the appellant's father he was taken up as a partner only in profits and respondent Nos.2 and 3 were ready and willing to show the accounts from January 1 1974 onwards till the day of filing of the suit. The tenancy right of the premises where the partnership was going belonged to Mohammedbhai Pirbhai - respondent No.3 and, therefore, none else had any interest therein. It was also contended that the appellant had no interest in the goodwill of the business. It was further contended that the appellant himself had several times seen the books of accounts and that they were always ready and

willing to show the books of accounts to the appellant. It was further contended that the respondents had no objection if the appellant wanted to retire from the suit firm and in that event the respondents were prepared to pay whatever amount that was found due to him towards profit and ultimately it was prayed to dismiss the suit.

4. The trial court formulated the issues at Ex.18 in light of the pleadings of the parties. Viva voce and documentary evidence were considered and upon appreciation and analysis of the said evidence, the trial court reached to the conclusions that:

i) the appellant was taken up as a partner in the firm of M/s. Mohammedbhai & Co., in place of his brother Fakirbhai Mohammed Allauddin.
ii) The suit shop where the business of partnership was going on was of the exclusive tenancy right of respondent No.3 and, therefore, the appellant has no tenancy right in the suit shop.
iii) The appellant has goodwill right in the business to the extent of 1/3 share so far as the stock in trade is concerned.
iv) The trial court ordered that respondent Nos.2 and 3 shall render the account from 1.1.1974 till the date of the suit.

5. In view of the aforesaid conclusions reached by the trial court, a preliminary decree is passed by declaring the partnership firm run in the name and style of M/s. Mohammedbhai & Co. be dissolved from the date of the suit and respondent Nos.2 and 3 are held liable to render the accounts from 1.1.1974 till the date of the suit and for that purpose Commissioner is also appointed. It is this preliminary decree which is now impugned in this appeal at the instance of the appellant.

6. Though the respondents are served they elected not to remain present.

7. Mr. M.B. Gandhi, learned advocate for the appellant, vehemently and repeatedly raised the following contentions:
i) That the appellant had invested capital in the conduct of the business and, therefore, appellant was very much entitled to profit and the interest on the capital employed by him from the date of filing of the suit till the declaration of dissolution of the partnership firm. In support of the aforesaid contention the learned advocate has referred to section 37 of the Partnership Act, 1932 ('the Act' for short). According

to the learned advocate, the learned trial Judge ought to have allowed the interest on the capital employed by the appellant on the profit earned from the partnership business from the date of the suit till dissolution of the partnership firm.

ii) The rent of the premises where the partnership business was going on was paid from the account of the partnership firm and therefore the appellant has a tenancy right over it though respondent No.3 was the tenant of the said premises.

8. I have considered the submissions made by Mr. Gandhi, learned advocate for the appellant. I have also perused the judgment and preliminary decree which is impugned in this appeal and also the evidence recorded by the trial Court and documentary evidence produced by the parties.

9. There is no dispute that the firm in the name and style of M/s. Mohammedbhai & Co., was initially constituted between the brother of the appellant and respondent Nos.2 and 3. Since the brother of the appellant had retired and appellant was taken in his place as partner the partnership firm was reconstituted and this can be reflected from the evidence of Fakir Mohammed Allauddin, brother of the appellant, who was examined at Ex.30. On perusal of the evidence of Fakirbhai it can be seen that the amount lying to the credit of Fakirbhai was not to carry interest at any rate. On the contrary it is an admitted position that as between Fakirbhai on the one hand and other partners of the old firm the accounts were not finally settled although Fakirbhai had no dispute with regard to these accounts. Therefore there was no recital in the reconstituted firm that the amount lying to the credit of Fakirbhai Mohammedbhai was to carry interest on the capital invested by him. Thereafter the amount lying to the credit of Fakirbhai was transferred to the name of the appellant and, therefore, there was no condition to pay interest to the appellant. Therefore the appellant was not entitled to any interest on the capital employed by him, that is, on the capital transferred from the credit of Fakirbhai to the name of the appellant, from the date of the filing of the suit till the dissolution of the partnership firm.

10. Much reliance has been placed on Section 37 of the Act by Mr. Gandhi, learned advocate for the appellant. According to him, in view of the provisions of the said section, outgoing partner has a right in the

share of the profit made since he ceased to be a partner. At this stage it would be profitable to refer to Section 37 of the Act which inter alia read as under:

"37. Right of outgoing partner in certain cases to share subsequent profits. Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with the property of the firm without any final settlement of accounts as between them and the outgoing partner of his estate then in the absence of a contract to the contrary, the outgoing partner or his estate is entitled at the option of himself or his representatives to such share of the profits made since he ceased to be a partner as may be attributable to the use of his share of the property of the firm or to interest at the rate of six per cent per annum on the amount of his share in the property of the firm:

Provided that where by contract between the partners an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner, and that option is duly exercised, the estate, of the deceased partner, or the outgoing partner or his estate, as the case may be, is not entitled to any further or other share of profits; but if any partner, assuming to act in exercise of the option does not in all material respects comply with the terms thereof, he is liable to account under the foregoing provisions of this section."

On a fair reading of the aforesaid provision it is clear that this Section is applicable to 2 classes of cases:

(A) Where -

(i) any member of the firm has died, or otherwise ceased to be a partner; and

(ii) the surviving or continuing partners carry on the business of the firm with the property of the firm without any final settlement of accounts as between them and the outgoing partner or his estate;

(B) Where -

(i) by contract between the partners an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner; and

(ii) that option is duly exercised.

In case (A) in the absence of a contract to the contrary, the outgoing partner, or the representative of the deceased partner, is entitled, at his option either-

(a) to such share of the profits made, since he ceased to be a partner, as may be attributable to the use of his share of the property of the firm, or as his option;

(b) to interest at the rate of 6% per annum on the amount of the share in the property of the firm.

And in case (B), the representative of a deceased partner, or the outgoing partner is--

(a) not entitled to any further or other share of profits, but

(b) if any partner assuming to act in exercise of the option does not in all material respects comply with the terms thereof;

that partner is liable to account as in case (A).

Therefore, undoubtedly this section is not applicable to the facts of the appellant's case. It is applicable to two classes of cases only and the appellant's case does not fall in any of the two classes as decree of dissolution of partnership was sought for and is passed by the learned trial Judge. Therefore, I am of the opinion that the appellant is not entitled to the loss of interest on the capital invested by him from the date of filing of the suit til the date of declaration of dissolution of the partnership firm. Hence the first contention advanced by Mr. Gandhi does not have any merit and hence it is rejected.

11. This takes me to the second contention raised by Mr. Gandhi with respect to the alleged tenancy right of the appellant over the suit premises. According to him, the appellant has got tenancy right over the property where partnership business was carried on. According to him, it is true that respondent No.3 was the tenant of the suit shop. However, in view of the fact that rent was paid from the account of the partnership firm the appellant has tenancy right over the suit property which was hired by respondent No.3.

12. In this connection it would be appropriate to refer to the oral testimony of the appellant himself which is recorded at Ex.20 wherein he has admitted that respondent No.3 was the tenant of the suit shop. He has no where stated that his tenancy rights were valued afresh at any point of time and were brought as property

of the firm either in the suit firm or at any time prior thereto by crediting the capital amount of Mohammedbhai Pirbhai i.e., respondent No.3. Though the rent was paid from the account of the partnership firm, from that fact alone it does not mean that all the partners have tenancy right over the suit property which was hired by respondent No.3 in his individual name. Therefore, in my view, the learned trial Judge has rightly held that tenancy right of the suit shop belongs to respondent No.3 and the appellant has no tenancy right over the suit property where the partnership business was carried on. Hence, the second contention raised by Mr. Gandhi is also devoid of any merit and is liable to be dismissed.

13. Seen in the above context, I find myself in complete agreement with the reasoning adopted by the trial court and the finding reached by it and resultantly the appeal having been found meritless is liable to be dismissed.

14. For the foregoing reasons, the appeal fails and accordingly it is dismissed with no order as to costs.

(A.M. Kapadia, J.)

(karan)